No. 22507

United States

COURT OF APPEALS

for the Ninth Circuit

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n the Matter of

'ORTLAND NEWSPAPER PUBLISHING 'OMPANY, INC.,

Bankrupt,

R. ANTHONY DUBAY,

Appellant,

v.

EVERETTE H. WILLIAMS, Trustee in Bankruptcy of PORTLAND NEWSPAPER PUBLISHING COMPANY, INC.,

Appellee.

BRIEF OF APPELLEE, EVERETTE H. WILLIAMS

On Appeal from the United States District Court for the District of Oregon

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JURISDICTION

Appellant filed a claim in the within proceedings claiming a secured interest in certain of the bankrupt's accounts receivable. The claim was disallowed by order of the Referee, which order was affirmed by the United States District Court.

The jurisdiction of this court is based upon an appeal from the order affirming the order of the Referee under Section 24(a) of the Bankruptcy Act, 11 U.S.C. § 47a.

STATEMENT OF THE CASE

While some background circumstances and admitted facts against which the issues may be projected may assist in a consideration of the issues, it is submitted that the recitation of those facts and circumstances contained in the opinion of the Referee and District Judge are adequate in this regard and do not need to be repeated. It is also submitted that the "Statement of the Case" and "Statement of Facts" of appellant should be read with caution since they contain facts which not only cloud the issues herein, but, in addition, assume as facts the very essence of the controversy herein. The pertinent facts necessary to decide the legal issues herein are as follows:

In July of 1962, the bankrupt's predecessor, Portland Reporter Publishing Company, Inc., and appellant entered into an agreement (Ex. 16) which provided for the assignment from time to time of certain accounts.

The pertinent provisions of the agreement are:

> "WHEREAS, Assignor desires to assign to Assignee accounts receivable which are unpaid but which are due and owing or which will become due for advertising services rendered by Assignor . . . .

"1. The Assignee will from time to time, during the continuance of this agreement, select such accounts receivable as shall total not more than $40,000 at any one time . . . .

"2. Concurrently with such selection the Assignor will, by proper instrument in writing, a form of which is attached hereto, unconditionally assign, transfer and set over to the Assignee, his successors and assigns, all of Assignor's rights, title and interest in said accounts . . . .

"5. If any such account cannot be collected within a reasonable time and after reasonable efforts, Assignor will accept a reassignment of said account and Assignee may thereupon select another account to be assigned."

Attached to the agreement was an executed assignment of certain advertising accounts, being 62 in number.

The Uniform Commercial Code went into effect in Oregon on the 1st day of September, 1963. A financing statement which noted a security interest in favor of appellant in accounts receivable of Portland Reporter Publishing Company was filed. No financing statement was ever filed showing the bankrupt as debtor.

From time to time, and under dates of August 31, 1962, April 30, 1963, November 30, 1963, February 24, 1964 and April 21, 1964, Memorandum lists containing therein certain accounts receivable and amounts due thereon, which such lists appellant

claims to be assignments of those accounts receivable, were delivered to appellant. The list of April 21, 1964 contained the names of only 14 of the 62 accounts included in the assignment of July 31, 1962.

On October 15, 1964, and after almost all of the accounts referred to on the Memorandum list of April 21, 1964, were collected, Portland Newspaper Publishing Company, Inc., successor corporation to Portland Reporter Publishing Company, filed bankruptcy. Appellant filed a "claim of secured creditor" (Ex. 15) asserting an interest in the current balances due on the accounts referred to and described in the list of April 21, 1964.

The Trustee filed an objection to the claim of appellant as a secured creditor, which such claim was disallowed by the Referee.

ANSWER TO SPECIFICATION OF ERROR NO. 1

Appellant did not have a lien on future balances in any particular account or accounts, or in future accounts, by reason of the agreement of July 31, 1962, or otherwise.

It is argued by appellant that the intention of the parties is clear. DuBay was to have a security interest in future accounts. To support said contention he recites in his statement of facts certain portions of the agreement of July 31, 1962. He omits therefrom paragraphs (2) and (5) which contain pertinent provisions. Those provisions and the entire agreement

are inconsistent with the transfer of accounts not yet in existence.

In further support of appellant's argument that the intention of the parties was clear, various portions of the testimony of the Controller are set forth. There was no testimony indicating, however, that the intention of Plotner was the intention of the corporation.

The agreement provided that appellant would "from time to time" select "accounts totaling $40,000.00," (later reduced to $35,000.00) and that, if appellant was unable to collect an account which had been assigned to him, he would reassign the account and select another account. The agreement also provided that when an account was selected it would be reassigned by a "proper instrument in writing," the form of which was attached to the agreement. Subsequently, and under dates of August 31, 1962, April 30, 1963, November 30, 1963, February 24, 1964, and April 21, 1964, lists of accounts in the form of memoranda were prepared. There appeared on the list of April 21, 1964, only 14 names that appeared in the list of 62 accounts named in the assignment of July 31, 1962. Accordingly, the list of April 21, 1962, was not a statement of current standing of accounts assigned on July 13, 1962, but could only have effect, if construed as a new assignment of accounts. Trustee contends that the provisions of the original agreement and all of the acts subsequent thereto, are inconsistent with the transfer of accounts not yet in existence

and negate the suggestion that there was an assignment of future accounts.

Even if the memorandum list of April 21, 1964, is considered as an assignment, it does not make reference to any future accounts. The list specifically names advertisers with specific amounts due at a particular time. Specific advertisers and amounts then due from them would not have been listed if the parties intended to assign future accounts.

The assignment of an "account" does not in and of itself include the assignment of after acquired or future balances in the account. To assign accounts which arise in the future, one must assign "future accounts" since by its very definition "account" is limited to moneys already due. UCC § 9-106(1) (ORS 79.1060(1)).

Because of a modification to U.C.C. § 9-106 in Oregon, appellant argues that in Oregon "account" may and can mean "future accounts." Trustee submits that the modified section, ORS 79.1060, has been misinterpreted. That statute reads:

> "In ORS 79.1010 to 79.5070, *unless the context otherwise requires*:
>
> (1) "Account means *any right to payment* for goods sold for services rendered . . .
>
> (2) "Contract right" means any right to payment under a contract *not yet earned* by performance . . . (Emphasis added).

A clear reading of the statute reveals that it is

not the context of the security agreement, but the *context* of Article 9 which the statute refers to.

If "account" were to mean "future" or "after acquired accounts" and "inventory" were to mean "future or acquired" inventory without the security agreement so specifically providing, the purpose of UCC § 9-204 (ORS 79.2040) would be rendered meaningless. *In re Taylored Products, Inc.*, 5 UCC Rep. 286, (D.C. W.D. Mich. Ref. op. 1968).

Appellant suggests that, as was allegedly done in *In re Bengston*, 3 UCC Rep. 283 (D.C. Conn. Ref. op. 1965), this court should construct an agreement as the parties "intended." *In re Bengston* is not authority for such. It did not even concern itself with Article 9 of the UCC, but dealt with the Connecticut Retail Installment Sales Financing Act. That act required the number of payments and the amount and date of each payment to be set out. Appropriate blanks did not contain the date of the starting payment, which the court held was unquestionably understood by the parties. It can hardly be said that those facts created a problem similar to the one presented here.

The DuBay agreement clearly did not include "future accounts." Inadvertent testimony by the Controller that "account" means "future account" is no reason to ask this court to redraw the agreement inconsistent with the terms thereof.

DuBay asserts that it is clear what the parties intended. All demonstrative evidence indicates that they did not intend to assign "future accounts." The min-

imum requirements necessary to create a security interest in "future accounts" were not fulfilled. That the parties may have intended to assign "future accounts" can avail appellant nothing if they did not in fact do so.

ANSWER TO SPECIFICATION OF ERROR NO. 2

Appellant contends first that the court erred in holding that the later DuBay assignments "did not even contain words of assignment or the signature of the debtor."

1. The question presented by the first portion of appellant's specification of error is whether or not a memorandum list of April 21, 1964, by itself is a "security agreement" within the intent and meaning of the Uniform Commercial Code. The contents of other lists which were supplied between the original agreement of July 31, 1962, and the list of April 21, 1964, are ignored since it is only the April 21, 1964, list upon which appellant relies (Ex. 15).

Appellant asserts that the Referee and District Judge are requiring "magic words" and that a clear reading of the memorandum read together with other agreements and coupled with the testimony of the controller produce a "security agreement." It is not, however, the lack of "magic words" that renders the memorandum list of April 21, 1964, ineffective but the lack of any words whatsoever which can be construed as an immediate transfer or assignment of accounts

or to impart a security interest therein. The memorandum does not by itself purport to create such an interest.

The pertinent provisions of the Uniform Commercial Code as adopted in Oregon and in question herein are as follows:

ORS 79.2030 (UCC § 9-203)

> "(1) Subject to the provision of ORS 74.2080 on the security interest of a collecting bank and ORS 79.1130 on a security interest arising under ORS 72.1010 to 72.7250 on sales, a security interest is not enforceable against the debtor or third parties unless;
>
> (a) The collateral is in the possession of the secured party; or
>
> (b) The debtor has *signed a security agreement* which contains a description of the collateral and in addition . . . ." (Emphasis added)

ORS 79.1050

> "(1) In ORS 79.1010 to 79.5070 unless the context otherwise requires:
>
> (h) Security agreement 'means an *agreement* which *creates* or *provides for a security interest.*' " (Emphasis added)

The above provisions are relatively simple. Magic words, acknowledgments, affidavits and the like are no longer necessary in modern commercial financing. All that is necessary is a written and *signed agreement* which "creates or provides for a security interest."

In the case of *American Card Company* v. *H.M.H. Co.*, 196 A.2d 150, 97 R.I. 59 (1963), a similar argument was made in contending that a financing statement signed by a debtor was a sufficient security agreement since it contained words and phrases such as "secured party," and "collateral." In that case, like here, appellant argued that "magic words" were unnecessary, that "under the unique circumstances that exist" the minimum requirements of UCC § 9-203 were satisfied, and that whether or not a security interest is "created or provided for," is a question of fact which must be decided upon the basis of the words and deeds of the parties. The court rejected the argument and held that *words of grant* were necessary and that words and deeds were insufficient to supply the absence of a required security agreement in writing.

In a recent case, *In re Fernandes Welding & Equipment Service, Inc.,-Safe Deposit Bank & Trust Co.* v. *Berman*, 5 UCC Rep. 1, — F.2d — (1 Cir., April 22, 1968) the debtor signed a promissory note which on its face stated:

> "*Security interest* in accounts receivable, contract rights etc. under *agreement* dated 6/26/53; Also equipment etc. under *security agreements* dated 7/30/63." (Emphasis added).

The court held that the note, even though reciting data relating to collateral security was not thereby converted into such an agreement.

In a similar case, the debtor signed a note stating thereon:

"There have been *deposited* herewith as *collateral security* the following: '1963 Ford Falcon . . . .' " (Emphasis added).

The court held:

"The recitation in the promissory note that the motor vehicle had been 'deposited' with the bank as collateral security falls far short of constituting even an inartful grant of a security interest." *In re Vielleux*, 5 UCC Rep. 277, 278 (D. Conn. Ref. op. 1967).

In re Excel Stores, Inc., 341 F.2d 961 (2 Cir. 1964) cited by appellant in this regard is not in point since it deals solely with the sufficiency of a financing statement.

Appellant argues (footnote, page 21 of brief) that if the formal requirements were not met in the memorandum lists, the agreement of July 31, 1962 should be revived to give DuBay an interest in the accounts listed therein. Appellant ignores the finding by a Referee that the agreement of July 31, 1962 was invalid as against the Trustee. Anticipating the argument that the filing of a financing statement revitalized and perfected the security interest created in the agreement, Trustee submits that the law is clear that a pre-Code agreement, void as to creditors, is not given life after the advent of the Code by the mere filing of a financing statement. In *Scott* v. *Stocker*, 380 F.2d 123 (10 Cir. 1967) the court specifically held that a security agreement entered into before the Uniform Commercial Code and at that time in-

valid as against creditors but valid under the code, was not validated by the code even though a financing statement was filed. In that case it was also argued that the financing statement was sufficient to constitute a security agreement. The court replied:

> "We see no merit in the appellants final argument that the financing statement filed on January 18, 1963, was sufficient also as a security agreement. Nowhere in the form is there an evidence of an *agreement by the debtor to grant to lender an interest* in the collateral." (Emphasis added) (Supra at p. 127)

The court, in the case of *Mid-Eastern Electronics, Inc.* v. *First Nat'l Bank of So. Md.*, 380 F.2d 355 (4 Cir. 1967) struck down an alleged security interest because of a lack of a signed agreement "giving even sketchily, the terms of the security agreement . . . ." (p. 356)

2. The second question presented by appellants specification of error No. 2 is whether or not a security agreement must be "signed" by the debtor or contain the debtor's signature.

It is only necessary to read the official comment to the Code to see that UCC § 9-203 (ORS 79.2030) is in the nature of a statute of frauds. Official comment 5 states in part:

> "The formal requisites stated in this section are not only conditions to enforceability for a security interest against third parties. They are in the nature of a *statute of frauds* * * * *. More harm than good would result from allowing cred-

itors to establish a secured status *by parol evidence* after they have neglected the simple formality of obtaining a *signed writing.*" (Emphasis added)

In the *Mid-Eastern Electronics* case (supra) the court in referring to UCC § 9-203 stated at page 356:

"A security interest, additionally, is unenforceable unless, under the Codes' statute of frauds, the debtor has signed a security agreement . . . 'agreement' means the *bargain of the parties* in fact . . . ." (Emphasis added)

The list of April 21, 1964 is not only unsigned, but is far from containing the bargain of the parties. No terms of any kind exist therein.

Appellant argues that the memorandum lists are "signed" because Keith Plotner, Controller, testified that he typed his name. Nowhere is there testimony that the Controller intended his "typing" to be the signature of the debtor, nor did he testify that by so typing his name he intended to "create or provide" for a security interest in favor of DuBay. It is submitted that there is no testimony that Plotner intended his typing "to authenticate" a security agreement under the meaning of UCC § 1-201 (ORS 71.2010 (30)).

The case of *Plemens* v. *Didde-Glaser, Inc.*, 224 A.2d 464, 244 Md. 556 (1966) cited by appellant deals with only the signature of the debtor on a financing statement. The court held that an individual's signature without a representation of capacity was

sufficient on a financing statement although it *might not be so as to a security agreement.*

Benedict v. *Lebowitz,* 346 F.2d 120 (2 Cir. 1965) deals not only with a financing statement but also with a signature of the creditor rather than that of the debtor. It is submitted that the above cases do not support appellant's contention.

APPELLANT'S SECURED CLAIM IS INVALID FOR OTHER REASONS THAN RECITED ABOVE

Appellant has asserted on this appeal only two propositions, the first that the assignments gave to him a lien on future accounts, and, secondly, that the memorandum list of April 21, 1964 was a valid assignment and did grant to him a security interest in the accounts listed therein. Appellant's claim fails, however, on numerous other grounds not referred to in his brief, as follows:

1. Because of the unfettered dominion and control over the accounts and their proceeds by the debtor, the agreement of July 31, 1962 was fraudulent in law. *Benedict* v. *Ratner,* 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 2d 991 (1925). The mere filing of a financing statement after the effective date of the Code was ineffectual to validate that agreement. *Scott* v. *Stocker,* 380 F.2d 123 (10 Cir. 1967).

2. Even if the agreement of July 31, 1962 included "future accounts" and the filing of the financing statement perfected the interest as to those accounts,

it would be void as to creditors existing at the time, and, therefore, as to the Trustee. (Ref's. op. p. 25).

3. The agreement of July 31, 1962, and, therefore, any assignments in accordance therewith, specifically provides that until default, the debtor remains the *sole owner* of the accounts. Such an agreement would seem to explicitly postpone perfection of DuBay's alleged security interest as provided for in UCC § 9-204. The perfection of the security interest on the 28th of September, 1964, by the declaration of default (Ref. op. p. 26) would, under the circumstances existing at the time, clearly be preferential.

4. Any security interest which DuBay may have had in any accounts of the bankrupt was not valid against the Trustee under UCC § 9-301(1) because it was unperfected. In order for a security agreement to be perfected, a financing statement must be filed. (UCC § 9-302). A financing statement must be signed by the debtor. (UCC § 9-402). No financing statement even listing the bankrupt as debtor was filed by DuBay. By reference, Trustee incorporates herein the argument contained on pages 17-20 of the brief of Everette H. Williams, Appellant, v. Rose City Development Company, Inc., Appellee, filed herein.

5. Assuming for the sake of argument that the DuBay assignments are valid as security agreements and grant a security interest in "future accounts" and otherwise survive the objections heretofore made, Trustee contends that as to those accounts which came into existence within the four months immediately

preceding the commencement of the within proceedings, DuBay would benefit by a preferential transfer voidable for the same reasons set forth by the Referee as to the claims of Rose City Development Company, Inc. Trustee incorporates by reference the brief of appellant, Everette H. Williams filed herein as it applies to the claim of Rose City Development Company, Inc., Appellee.

CONCLUSION

Appellant does not have a valid security interest in any of the accounts of the bankrupt. To hold otherwise would be to ignore the bare essential requirements and formalities which the Code requires. For the foregoing reasons, the order below, to the extent it affirmed the order of the Referee as to the alleged security interest of R. Anthony DuBay, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation f this brief, I have examined Rules 18, 19 and 39 of ıe United States Court of Appeals for the Ninth Cir- uit, and that, in my opinion, the foregoing brief is ı full compliance with those rules.

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